



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

IN REPLY
REFER TO:

1617.2(760)
PP-ID-EH-87-09

SEP 18 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Charles L. Blair
President, Idaho Chapter
The Wildlife Society
HC 33 Box 3228
Boise, Idaho 83706

Dear Mr. Blair:

We have carefully reviewed and considered your March 20, 1987, protest concerning the proposed adoption of the Egin-Hamer plan amendment to the Medicine Lodge Resource Management Plan (RMP). This amendment would provide for a right-of-way to construct a road across the Nine Mile Knoll Area of Critical Environmental Concern (ACEC), as requested by Fremont and Jefferson Counties, subject to winter closure and other provisions. We have also reviewed all records pertinent to the issues which you raised. The purpose of this letter is to advise you of the results of the review and our decision on your protest.

The Medicine Lodge RMP, approved November 29, 1985, designated the area in which the road is proposed as an ACEC. The ACEC provides forage for the 2,000-head Sand Creek elk herd, one of the largest free roaming elk herds in the West. The ACEC also contains the St. Anthony Sand Dunes, identified by the U.S. Fish and Wildlife Service as the second most unique ecosystem in Idaho. This designation was based on the presence of diverse vegetation, active sand dunes, Juniper Mountain, lava flows, 32 mammalian species, 94 avian species, and 11 species of amphibians or reptiles.

1. Issue: Whether Alternative D (construction of the road with provision for winter closure) should be adopted when the closure would be very difficult to enforce?

Response: Using the Bureau of Land Management (BLM) planning and the National Environmental Policy Act (NEPA) regulations and procedures, including those for extensive public involvement, we have settled on a planning decision which responds to the major concern of the commenters and protesters while providing for a right-of-way requested by the county officials. To summarize the process used in reaching this decision, the BLM prepared an environmental assessment which showed the need for an environmental impact statement (EIS). Draft and final EISs were prepared. This was done following established NEPA and plan amendment procedures, including those for public participation and review, interagency and intergovernment coordination and consultation, and those requiring consistency with other plans and programs. To protect the resources and the values which led to designating the area as an ACEC, the proposed plan amendment incorporates as terms and conditions the following important land use constraints:

The road would be closed to vehicle traffic from December 1 through March 31.

It would be a stipulation of the right-of-way that the seasonal closure would be enforced by Fremont and Jefferson Counties.

To enforce the closure, the counties would have to pass ordinances closing the road during the winter.

Failure of the counties to effect the seasonal closure would cause revocation of the right-of-way.

Since concern expressed in the protests showed a need to clarify how the proposed decision would be implemented, the BLM Idaho State Director intends to specify the following conditions, which are not necessarily all-inclusive, in the RMP amendment:

At the time the road is constructed, the counties must install an effective barrier at each end of the road. (The purpose of the barrier would be to ensure the road is closed during the specified annual period.)

In accepting the right-of-way, the counties will agree to enforce the road closure ordinances.

The counties must provide the BLM with a plan of operations for enforcing the road closure from December 1 through March 31. This plan must include a schedule of construction and a provision showing that the counties have the legal authority to close the road each year. This plan may necessitate the counties' passing ordinances if such authority is lacking at present. The right-of-way will not be issued until the applicants provide the BLM with the plan. This plan must be approved by the authorized officer.

Repeal of the road closure ordinances by either county will result in revocation of the right-of-way grant.

Counties will be required to erect and maintain signs at each end of the road and other appropriate locations to inform the public of the annual road closure.

No maintenance or construction work on the road would be allowed during the specified annual period of closure.

The right-of-way grant will state that noncompliance with the terms, conditions, or stipulations of the grant will result in termination of the grant. The procedures for terminating the grant would be those described in 43 CFR 2803.4, including written notice to the grantee. If an immediate temporary suspension of activities on the right-of-way is required, then the procedures of 43 CFR 2803.3 would be used.

Because the proposed alternative would have the County officials close the road to vehicular traffic during the months in which the area is inhabited by the elk, the effects on the elk herd would be effectively mitigated, thereby allowing the present size (2,000) and health of the elk herd to be maintained. Additionally, the proposed alternative would meet the County officials' request for a road on the route applied for by them. We believe that with the above described safeguards no significant adverse effects will result to the elk herd or to other public land resource values. Our detailed environmental studies based upon available data and mitigation measures set out above lead us to that conclusion. We hope that you will reach the same conclusion.

2. Issue: Whether Alternative D (construction of the road with provision for winter closure) should be adopted when the main incentive for the County Commissioners to enforce the winter road closure is the BLM's authority to revoke the right-of-way for failure to comply with the terms?

Response: The termination of a right-of-way grant is not a routine event, nor one the BLM would take lightly. However, recently the BLM terminated a right-of-way grant in Idaho for failure to comply with the terms of the grant. The extremely high value of the elk herd and the continuing public interest and involvement in this action would help ensure that the Egin-Hamer right-of-way grant would be terminated for failure to comply with the stipulations.

3. Issue: Whether four restrictive conditions should be incorporated into the grant of the right-of-way when those conditions would be:

1. "dictate performance standards to be met by the Applicants before the road could be built;"
2. "describe responsibilities of both the Applicants and the BLM;"
3. "specify actions that would constitute a violation of the terms of the right-of-way grant"; and
4. "require that immediate and automatic revocation of the right-of-way for any infraction of its terms and conditions?"

Response: Please see response to issue #1 raised by you. As described above, the right-of-way grant would be conditioned on the Counties developing a plan of operations, agreeing to enforce the road closure, and agreeing to place effective barriers at each end of the road. Failure by the Counties to close the road and enforce that closure would result in termination of the grant.

The procedures for terminating the grant would be those described in 43 CFR 2803.4, including written notice to the grantee. If an immediate temporary suspension of activities on the right-of-way is required, then the procedures of 43 CFR 2803.3 would be used.

4. Issue: Whether the burden to prove "willingness and intent to aggressively enforce the four-month winter road closure" should be placed on the applicants for the right-of-way when not doing so would be "condoning the demise of the principal resource of the ACEC?"

Response: By placing terms and conditions in the offered right-of-way grant, the BLM is requiring a commitment by the Counties to enforce a winter closure before approval of that grant. It is in recognition of the importance of the elk herd and the other resources of the Nine Mile ACEC that the BLM is placing the special terms and conditions in the offered right-of-way grant.

5. Issue: Whether Alternative D (construction of the road with provision for winter closure) should be adopted when it is unclear "what would constitute a violation of the terms of the right-of-way?"

Response: Examples of not being in compliance with the terms of the right-of-way grant would be demonstrating noncompliance by 1) not closing the barrier, 2) not denying access during the specified period of closure, or 3) not patrolling and enforcing the closure.

6. Issue: Whether Alternative D (construction of the road with provision for winter closure) should be adopted when the BLM procedure for revoking the right-of-way is unclear?

Response: The procedures for revoking the right-of-way are spelled out clearly in the BLM regulations. Pursuant to 43 CFR 2803.4, the BLM may suspend or terminate grants of rights-of-way. That regulation states that an authorized officer may suspend or terminate a right-of-way grant if he determines that the holder has failed to comply with any terms, conditions, or stipulations included in the right-of-way grant. Under these regulations, the authorized officer must give the holder written notice that termination is contemplated, the grounds for the proposed terminations, and must allow the holder a reasonable opportunity to cure any noncompliance. If an immediate temporary suspension of activities on the right-of-way is required, then the procedures of 43 CFR 2803.3 would be used.

7. Issue: Whether the BLM would revoke a right-of-way when "political pressure, and not facts, is the driving force behind the present decision" and would presumably be present in any decision to revoke the same right-of-way?

Response: Please see response to issue #2.

8. Issue: Who would "pay the costs of removing the road and reestablishing the native vegetation that presently exists on the site" in the event the right-of-way were revoked?

Response: Under 43 CFR 2803.4-1, the holder of a right-of-way grant that has been terminated, revoked or canceled must remove any structures and improvements and "shall restore the site to a condition satisfactory to the authorized officer." Thus, the Counties (the applicants) would be responsible for restoring the area to the same condition it was in prior to the grant of the right-of-way. In the event of noncompliance with this regulatory provision, the BLM may restore the site and initiate action against the Counties for reimbursement of costs.

9. Issue: Who would "pay depredation costs for elk that are displaced from the ACEC onto adjacent private farm lands" in the event the rights-of-way were revoked?

Response: In the State of Idaho, the Department of Fish and Game resolves crop depredation problems; the BLM lacks authority to determine who would pay depredation costs.

10. Issue: Whether Alternative D (construction of the road with provision for winter closure) should be adopted when discussion is lacking in the EIS on the mitigation of impacts on adjacent farm lands in the event of displacement of the elk?

Response: The effect on the elk of constructing the proposed road would be mitigated by the provisions to close the road during the winter and to terminate the right-of-way grant in the event of noncompliance by the holders of the right-of-way grant. These two mitigating measures are presented in the environmental impact statement. The BLM expects that these mitigation measures would prevent displacement of the elk; so there would be no impacts on adjacent farm lands.

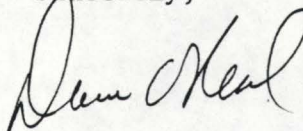
11. Issue: Whether approval of the right-of-way should "stipulate that the right-of-way would be immediately and automatically revoked at the slightest violation of its terms and conditions and that the revocation be permanent, with no appeal process for the applicants or any other party?"

Response: Please see responses to issues #1, #3, and #6.

After reviewing all the protests and the planning records we conclude that the BLM Idaho State Director and the Idaho Falls District Manager substantively followed applicable planning procedures, laws, regulations, policies, and resource considerations in developing the plan amendment for the Egin-Hamer right-of-way. They provided ample opportunity for public comment and evaluated the comments received along with other pertinent information prior to making the decision on the plan amendment.

This is the final decision of the Department of the Interior on your protest. As a final decision it exhausts the administrative remedies available to appeal the issues which you have raised. Under precedent set in an Interior Board of Land Appeals (IBLA) decision, Oregon Natural Resource Council (73 IBLA 124, 127 (1983)), adoption of the plan amendment may not be appealed further administratively. However, any person adversely affected by a decision of a BLM officer to implement the action proposed in the plan amendment may appeal to the IBLA pursuant to 43 CFR 4.400 at the time the BLM issues the right-of-way.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tom King".

Tom King Director